

in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of § 801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.

(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

(1)(i) The acquiring person has annual net sales or total assets of \$100 million or more;

(ii) The joint venture or other corporation will have total assets of \$10 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more; or

(2)(i) The acquiring person has annual net sales or total assets of \$10 million or more;

(ii) The joint venture or other corporation will have total assets of \$100 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of \$10 million or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint

venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

*Examples:* 1. Persons “A,” “B,” and “C” agree to create new corporation “N,” a joint venture. “A,” “B,” and “C” will each hold one third of the shares of “N.” “A” has more than \$100 million in annual net sales. “B” has more than \$10 million in total assets but less than \$100 million in annual net sales and total assets. Both “C”’s total assets and its annual net sales are less than \$10 million. “A,” “B,” and “C” are each engaged in commerce. “A,” “B,” and “C” have agreed to make an aggregate initial contribution to the new entity of \$18 million in assets and each to make additional contributions of \$21 million in each of the next three years. Under paragraph (d), the assets of the new corporation are \$207 million. Under paragraph (c), “A” and “B” must file notification. Note that “A” and “B” also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for \$69 million. N need not file notification; see § 802.41.

2. In the preceding example “A” has over \$10 million but less than \$100 million in sales and assets, “B” and “C” have less than \$10 million in sales and assets. “N” has total assets of \$500 million. Assume that “A” will acquire 50 percent of the voting securities of “N” and “B” and “C” will each acquire 25 percent. Since “A” will acquire in excess of \$200 million in voting securities of “N”, the size-of-person test in § 801.40(c) is inapplicable and “A” is required to file notification.

[43 FR 33537, July 31, 1978, as amended at 48 FR 34434, July 29, 1983; 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001]

#### **§ 801.90 Transactions or devices for avoidance.**

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation

to comply shall be determined by applying the act and these rules to the substance of the transaction.

*Examples:* 1. Suppose corporations "A" and "B" wish to form a joint venture. "A" and "B" contemplate a total investment of over \$100 million in the joint venture; persons "A" and "B" each has total assets in excess of \$100 million. Instead of filing notification pursuant to §801.40, "A" creates a new subsidiary, A1, which issues half of its authorized shares to "A." Assume that A1 has total assets of \$3000. "A" then sells 50 percent of its A1 stock to "B" for \$1500. Thereafter, "A" and "B" each contribute \$53 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to "A" and "B"). "A"'s creation of A1 was exempt under §802.30 of this chapter; its \$1500 sale of A1 stock to "B" did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisitions of stock in A1 by "A" and "B" were exempt under Sections 7A(c)(3) and (10), because "A" and "B" each already controlled A1, based on their holdings of 50 percent of A1's then-outstanding shares. Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by "A" and "B" having over \$10 million in assets. Such a transaction would be covered by §801.40, and "A" and "B" must file notification and observe the waiting period.

2. Suppose "A" wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than \$10 million. The aggregate fair market value of the assets of the twenty store corporations is \$60 million. "A" proposes to sell the stores to "B" for \$60 million. For various reasons it is decided that "B" will buy the stock of each of the store corporations from "A." Instead of filing notification and observing the waiting period as contemplated by the act, "A" and "B" enter into a series of five stock purchase-sale agreements for \$12 million each. Under the terms of each contract, the stock of four stores will pass from "A" to "B". The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§801.13(a) does not apply because control has passed, see §801.2), and because \$12 million is below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five sep-

arate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

[43 FR 33537, July 31, 1978, as amended at 66 FR 8691, Feb. 1, 2001; 67 FR 11903, Mar. 18, 2002]

## PART 802—EXEMPTION RULES

Sec.

- 802.1 Acquisitions of goods and realty in the ordinary course of business.
- 802.2 Certain acquisitions of real property assets.
- 802.3 Acquisitions of carbon-based mineral reserves.
- 802.4 Acquisitions of voting securities of issuers holding certain assets the direct acquisition of which is exempt.
- 802.5 Acquisitions of investment rental property assets.
- 802.6 Federal agency approval.
- 802.8 Certain supervisory acquisitions.
- 802.9 Acquisition solely for the purpose of investment.
- 802.10 Stock dividends and splits.
- 802.20 [Reserved]
- 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold.
- 802.23 Amended or renewed tender offers.
- 802.30 Intraperson transactions.
- 802.31 Acquisitions of convertible voting securities.
- 802.35 Acquisitions by employee trusts.
- 802.40 Exempt formation of joint venture or other corporations.
- 802.41 Joint venture or other corporations at time of formation.
- 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.
- 802.50 Acquisitions of foreign assets.
- 802.51 Acquisitions of voting securities of a foreign issuer.
- 802.52 Acquisitions by or from foreign governmental corporations.
- 802.53 Certain foreign banking transactions.
- 802.60 Acquisitions by securities underwriters.
- 802.63 Certain acquisitions by creditors and insurers.
- 802.64 Acquisitions of voting securities by certain institutional investors.
- 802.70 Acquisitions subject to order.
- 802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

AUTHORITY: 15 U.S.C. 18a(d).

SOURCE: 43 FR 33544, July 31, 1978, unless otherwise noted.